

1726551 (Migration) [2020] AATA 500 (18 February 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1726551

MEMBER: Adrienne Millbank

DATE: 18 February 2020

PLACE OF DECISION: Brisbane

DECISION: The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211 of Schedule 2 to the Regulations
- cl.820.221 of Schedule 2 to the Regulations.

The secondary applicant meets cl.820.311 of Schedule 2 to the Regulations.

Statement made on 18 February 2020 at 3:46pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine spousal relationship – apparent hastiness and timing of marriage – financial aspects – nature of household – forcibly separated due to Temporary Protection Order – social aspects – relationship with children from previous marriages – nature of commitment – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls, 820.211, 820.221, 820.311

CASES

He v MIBP [2017] FCAFC 206

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s.65 of the *Migration Act 1958* (the Act).
3. The first named applicant (the applicant) was born in Hungary in [year] and is [age] years old at the time of decision. She first arrived in Australia on a Tourist [visa]. On 11 October 2012 she was granted a Student [visa] as a dependant of her then partner. She subsequently was granted two further Student [(dependant) visas]. The applicant declared two previous marriages and one de facto relationship which began in 2012 and ended in separation in January 2015. She has one son, the secondary applicant, born in Hungary in [year], who is [age] years old at the time of decision.
4. The sponsor was born in Australia in [year] to parents who migrated from Hungary. He is [age] years old at the time of decision. He declared three previous marriages from which he has four daughters, three of whom are adults. He sponsored one of his former wives on a Partner visa, in an application lodged in 1981 and granted in 1982.
5. The parties met on 18 January 2015 at a birthday party and entered into a relationship in June 2015. They married in November 2015.
6. The applicant applied for the visa on 3 December 2015 on the basis of her relationship with her sponsor. At this time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
7. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a). The delegate considered the information provided in relation to the matters prescribed under r.1.15A and r.1.09A insufficient to demonstrate that the applicant was the spouse or de facto partner of the sponsor, as defined under s.5F and s.5CB.
8. The delegate was concerned regarding the apparent hastiness and timing of the marriage, shortly before the expiry of the applicant's third Student [visa] on 12 December 2015 and before family members could arrange to attend. The delegate was further concerned that the applicant was not living with the sponsor at the time telephone interviews were conducted with the applicant, the secondary applicant and the sponsor on 22 September 2016. At that time the sponsor was subject to a Temporary Protection Order following a domestic violence incident in August 2016. The delegate was not convinced that the parties intended to live together in the future.
9. The delegate found that the secondary applicant did not meet cl.820.321.
10. The applicants appeared before the Tribunal on 11 February 2020 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and the secondary applicant. The Tribunal hearing was conducted with the assistance of an interpreter in the Hungarian and English languages.
11. The applicants were represented in relation to the review by their registered migration agent.

12. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. The issue in the present case is whether the parties were in a genuine spousal relationship at the time of application and this decision.

Whether the parties are in a spouse or de facto relationship

14. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor, who is an Australian citizen by birth.
15. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

16. If the parties are validly married, they may meet the requirements of a married relationship but not a de facto relationship. A Commonwealth of Australia Certificate of Marriage was provided certifying that the parties married [in] November 2015 [in Australian City 1]. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects of the relationship

17. At hearing, the parties confirmed that they do not jointly own significant assets such as property or shares. They stated that they own three cars, two of which are registered in the joint names of the applicant and the sponsor. They confirmed they have no joint liabilities or legal obligations owed to the other apart from those arising from their joint tenancy lease, their marriage, and their wills naming each other as beneficiaries. The sponsor confirmed that he is retired and in receipt of a Centrelink pension. The applicant advised that she is working two jobs; she manages a [Industry 1] business, and she works shifts in an [Industry 2] facility.
18. Statements of transactions were provided from the parties' joint bank account and personal bank accounts over the nearly four-year period from February 2016 to December 2019. The statements support the advice provided in the representative's written submission dated 5 February 2020 and by the parties at hearing about how they organise their finances as a couple. They show the applicant's earnings are deposited into her personal bank account and that she uses her income to pay the rent, utility costs, and to support her son including

through the payment of his course fees as an international student. They show the sponsor's Centrelink pension is deposited into his account, and that he does the supermarket shopping and purchases food, petrol and other items for the household.

19. A bank statement was provided showing that at the time of decision a balance of AUD\$12,885.10 was held in a savings account in the applicant's name. At hearing, the parties advised that the applicant is a better money manager, and that these savings, towards buying a house, were safer with her than in a joint account. The applicant stated that she was fed up with living in rented houses, and that purchasing their own home took precedence over another goal they were saving towards of a trip to Hungary together.
20. The Tribunal is satisfied on the evidence provided that the parties have pooled their finances, share day-to-day household expenses and have joint financial goals.

Nature of the household

21. The Tribunal asked the parties at hearing to clarify when and where they have lived together in Australia, and how long they lived apart. The parties advised that they were forced to live separately following a domestic violence incident in 2016. A Temporary Protection Order was taken out against the sponsor by the police against the wishes of the applicant and the secondary applicant, because a firearm was involved. The parties advised that they lived together again as soon as possible. They advised that they lived together from the date of their marriage in a rented house in [Suburb 1]. The sponsor stated that while his Temporary Protection Order was not completely and formally lifted until June 2017, he in fact returned to live with the applicant in February 2017, as soon as he completed his alcohol rehabilitation program. The parties stated that they have lived together since this time and have spent no time apart except for several weeks early in 2019 when the applicant returned to Hungary because of an illness in the family.
22. The secondary applicant confirmed that he has lived with the applicant and the sponsor since arriving in the country in September 2015, apart from one brief trip to Hungary. Photos were provided showing the parties together at home. The representative's submission states, and the parties confirmed at hearing, that the applicant and the sponsor give cash to the secondary applicant for pocket money. In written statements and statutory declarations signed in January 2020 and February 2020, friends of the applicant and the sponsor declared they observed the sponsor was supportive of the secondary applicant, and that he helped him in his studies in [Discipline 1] and English.
23. Copies of mail, including utility, mobile and internet bills sent to the parties at the same addresses in [Suburb 1] and [Suburb 2], from 2015 to 2020, were provided. A copy of a joint tenancy agreement for the parties' current [Suburb 2] address was provided, along with rental receipts up to February 2020. A written statement was provided from a friend of the sponsor with whom the parties lived for some months, stating that he invited the family to stay with him during the time of the Commonwealth Games [in City 1] before they moved into their current rental property.
24. The representative's submission of 5 February 2020 advises, and the parties confirmed at hearing, that the sponsor does the bulk of the housework while the applicant works. The sponsor advised at hearing that the applicant is not particularly appreciative of his cooking, while he is very appreciative of her cooking, especially her traditional Hungarian dishes. He stated that he nevertheless prepared meals when the applicant was working, and when the applicant cooked he cleaned up. The secondary applicant stated that he sometimes cooked. The sponsor confirmed that he did the shopping for the household.

25. The Tribunal accepts on the evidence provided that the parties have established a joint household where they share responsibility for the housework and the care and support of the secondary applicant.

Social aspects of the relationship

26. The Tribunal asked the sponsor at hearing why his daughters did not attend his wedding. He stated that there is sensitivity and resentment within his former families regarding the divorces and his subsequent marriages, and he didn't want to force his children into a situation where they might feel uncomfortable. The applicant confirmed that she has met the sponsor's children, and that they have visited the parties at their home. The sponsor described how he maintains communications with and keeps tabs on his daughters. The applicant described how she and the sponsor were working towards establishing good relationships with all of his daughters and their families.
27. The Tribunal asked the parties whether they married when they did, before the expiry of the applicant's Student [(dependant) visa], for the purpose of the visa application. The sponsor stated with some force that he married the applicant when he did because he loved her and wanted to share his life with her and would have married her regardless of her visa situation. The applicant confirmed that the secondary applicant and a number of their friends attended the wedding.
28. A written statement was provided signed on 23 January 2020 by the applicant's mother who advised that she has visited and stayed with the parties in Australia three times and observed them to be a happy and compatible couple. The applicant advised at hearing that her father accompanied her mother on one of her trips.
29. Statutory declarations were provided by friends of the parties signed in November 2015 in which the declarants stated they had observed the applicant and sponsor to be a compatible couple who complemented each other. They observed that the parties involved themselves as a couple in Hungarian community festival activities. Statutory declarations and written statements were provided signed in January and February 2020 by colleagues and friends of the parties in which the writers stated that they have known the applicant and the sponsor since 2015 as a married couple, that they have invited and been invited to share meals and socialise with them and the applicant's son, and that they have observed them to be a happy and friendly couple and family.
30. The applicant's mother and a sister of the sponsor offered to provide oral testimony in support of the parties' relationship at hearing over the phone. The Tribunal decided that it did not need to obtain this further testimony.
31. The Tribunal accepts on the evidence provided that the parties have represented themselves to other people as being married to each other, that the opinion of friends and acquaintances is that they are a married couple, and that they plan and undertake joint social activities as a married couple.

Nature of persons' commitment to each other

32. The parties have been married since November 2015 and have lived together since this time, for over four years, except for a period of around seven months when they were forcibly separated by a Temporary Protection Order and the sponsor's time in rehabilitation.
33. The applicant and the sponsor were forthcoming, articulate and open at hearing. The Tribunal found them credible and compelling witnesses and accepted their testimony that they have been and are in a genuine and committed relationship. The Tribunal accepts that

they have supported each other through difficult times, that they have been and are each other's main source of companionship and emotional support, and that they see the relationship as long-term.

34. Having considered the above matters and the circumstances of the parties, the Tribunal finds that they have a mutual commitment to shared life to the exclusion of others; that they are in a genuine and continuing relationship; and that they live together or not separately and apart on a permanent basis.
35. On the basis of the above, the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
36. Therefore the applicant meets cl.820.211(2)(a) and cl.820.221(1)(a).
37. The sponsor is the spouse of the applicant and both are over 18 years of age. Therefore the applicant meets cl.820.211(2)(c). The applicant was the holder of a substantive visa at the time of application, therefore she meets cl.820.211. There is no information before the Tribunal, including in the sponsor's ICSE records, to indicate that the sponsorship has not been approved by the Minister and is not still in force. Therefore the applicant meets cl.820.221(4).
38. Therefore the applicant meets cl.820.211 and cl.820.221.
39. Evidence was provided including in the form of mail addressed to the secondary applicant at the same addresses, receipts for clothing purchased for the secondary applicant, and written submissions and testimony at hearing that the applicant and the sponsor provided at the time of application, and of this decision, for the secondary applicant's needs for shelter, food and clothing. At hearing, the secondary applicant confirmed that he has not been in paid employment since arriving in Australia. Evidence was provided that he has enrolled as an international student in English courses, in a [Qualification 1], and in a [Qualification 2] due to be completed in March 2020.
40. The Tribunal accepts on the evidence provided that at the time of application and this decision, the secondary applicant was a dependent child of the applicant. The Tribunal accepts that the secondary applicant had been for substantial periods immediately before the time of application and the time of this decision wholly or substantially reliant on the applicant and the sponsor for financial support to meet his basic needs for food, clothing and shelter; and his reliance on the applicant and the sponsor was greater than any reliance on any other person, or source of support, for financial support to meet his basic needs for food, clothing and shelter.
41. Given the findings above, the appropriate course is to remit the applications for the visa to the Minister to consider the remaining criteria for a Subclass 820 (Partner) visa.

DECISION

42. The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211 of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations.

The secondary applicant meets cl.820.311 of Schedule 2 to the Regulations.

Adrienne Millbank
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).